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No. 86-388

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE,

PETITIONER,

V.

ANA ESTELA GUEVARA FLORES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

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IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner

v.

ANA ESTELA GUEVARA FLORES, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Ana Estela Guevara Flores, respectfully opposes the petition for certiorari filed by the Immigration and Naturalization Service in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 786 F.2d 1242. The orders of the Board of Immigration Appeals (Pet. App. 25a-31a) and the decision of the immigration judge (Pet. App. 32a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1986, and a petition for rehearing was denied on June 9, 1986 (Pet. App. 24a). The petition for a writ of certiorari was filed on September 8, 1986. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

INTRODUCTORY STATEMENT

In INS v. Stevic, 467 U.S. 407 (1984), this Court held that an applicant for temporary withholding of deportation must show a "clear probability" of persecution. The circuits are now split on the question whether the statutory "well-founded fear of persecution" standard in asylum cases is different from or the same as this "clear probability" test. That question is now before the Court in INS v. Cardoza-Fonseca, No. 85-782, argued October 7, 1986.

Asserting this case presents that same question, the INS requests that the petition in this case be held pending the decision in Cardoza-Fonseca.

However, there is no good reason to hold the petition in this case. Since immigration judges are required by regulation to treat all applications for asylum as applications for withholding of deportation as well, the immigration judge on remand will determine the merits of respondent's application under both standards. If this Court's decision in Cardoza-Fonseca then makes it clear that there is only a single standard, the determination based on that standard can simply be applied to both applications. Since the remand is unlikely to run its course before the proper standard is announced, the cause of judicial and administrative efficiency will be served by permitting the remand to occur without delay.

Moreover, it has now been more than six years since respondent first applied for asylum and began this arduous process. A delay of the remand will continue to have serious adverse consequences for respondent. Until her status is resolved, respondent cannot obtain work authorization or certain public benefits, nor can she begin the process of obtaining permanent residence and eventual U.S. citizenship.

STATEMENT OF THE CASE

Respondent Ana Estela Guevara Flores is a native and citizen of El Salvador who last entered the United States in June 1981. Mistaking the respondent for a leftist leader named Norma Fidelina Guevara, "Comandante Norma", the INS referred her case for investigation to the Federal Bureau of Investigation and for prosecution for unlawful entry by the United States Attorney's office and commenced

deportation proceedings.[1] At a hearing in October 1981, Ms. Guevara Flores applied for political asylum before an immigration judge pursuant to Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1158(a), and for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. Sec. 1253(h).

Fearful that she and her family in El Salvador were endangered by the substantial publicity about her arrest and false accusations that she was the "Comandante Norma," respondent requested guarantees from the immigration judge that the contents of her asylum application and testimony would be held confidential before providing details about her activities,

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1/ INS admitted in court testimony that she was criminally prosecuted for unlawful entry, 8 U.S.C. 1325, in order to "hold her around a little longer in order to let the FBI complete their investigation." Orantes-Hernandez v. Meese, CV 82-1107 (C.D. CA), testimony of James W. Knight, November 21, 1986, p. 126.

political opinions, and the addresses of her close relatives. She also sought administrative subpoenas for all communications and correspondence between U.S. government agencies and with the Salvadoran government that concerned her.

The immigration Judge denied both motions. Fearing the consequences of additional breaches of her confidentiality, respondent then declined to answer numerous questions. The immigration judge found respondent had failed to show a clear probability that she would be subject to persecution in El Salvador and denied both asylum and withholding of deporation. (Pet. App. 38a) The judge did find that respondent merited the favorable exercise of discretion, and granted her the privilege of voluntary departure under section 244(e) of the Act, 8 U.S.C. Sec. 1254(e). (Pet. App. 41a-42a) She then appealed to the Board of Immigration Appeals (hereafter, "the Board") which

dismissed her claims. (Pet. App. 29a-31a)

Shortly after the Board's affirmance, respondent moved to reopen the proceedings below in light of material evidence that had not been available or discoverable at her initial hearing. 8 C.F.R. 3.2, 3.8 (1985) That evidence consisted of three declassified FBI cables which she had sought earlier, and which mentioned her specifically, but which the FBI withheld from her until roughly two years after her hearing. (Pet. App. 8a-9a)

As noted in her motion to reopen, the FBI cables illustrated the gravity of her situation if deported. The documents in her possession when she was apprehended had been requested by the Salvadoran authorities and identified her with those segments of the church in El Salvador which were opposed to the government's policies. Moreover, the cables conclusively demonstrated that even though the Salvadoran authorities had determined that she was not the Comandante,

the director of the Salvadoran National Guard, who is currently the Minister of Defense, was still actively pursuing her case and the U.S. government was aware that she was certain to be detained for political reasons. Furthermore, she represented that her family in El Salvador had been persecuted as a result of the FBI's disclosures to the Salvadoran authorities and their speculation about her activities.

The Board acknowledged that the cables reasonably suggested that the respondent "may be questioned or detained in El Salvador," but found they did not demonstrate that she would be "executed for her political beliefs."[2]

2/ The Board improperly construed "persecution" in the most narrow sense. As the Board has repeatedly noted, the concept of "persecution" encompasses either a threat to the life or freedom of, or the infliction of a broad range of "suffering or harm upon, those who differ in a way regarded as offensive," including confinement, torture, and severe economic deprivation. Matter of Acosta, Int. Dec. #2986 at 16 (BIA 1985); Matter of Laipenieks, 18 I & N Dec. 433, 456-57 (BIA 1983).

(Pet. App. 27a) Concluding that she had not presented sufficient evidence to meet her burden of establishing a prima facie case for asylum or withholding of deportation, her motion to reopen was denied. (Pet. App.27a-28a)

The Court of Appeals reversed the Board's denial of respondent's motion to reopen and remanded the asylum application for further proceedings. (Pet. App. 14a-18a) The court found that the new documentary evidence was material and "pertinent to the contentions raised in her asylum application" and that she had demonstrated a reasonable likelihood that she could meet the statutory requirements for relief in a reopened hearing.[3]

3/ Respondent is clearly endangered because of her affiliations with the church. The Board has recognized that persons "actively involved in the 'progressive' church in El Salvador are persecuted," Matter of Paniagua, A24 166 230 (BIA Jan. 23, 1985); See also, Matter of Sanchez and Escobar, Int. Dec. #2996 (BIA 1985), ("Considerable evidence was offered relating to claims that persecution occurred because of participation in specific groups that actively and publicly opposed the (continued on following page)

(Pet. App. 5a n. 2) In so doing, the Court joined the sixth, seventh, and ninth circuits in defining the "well-founded fear of persecution" standard which an asylum applicant must satisfy to be meaningfully different from the "clear probability" standard applicable to withholding of deportation claims. INS V. Stevic, 104 S. Ct. 2489 (1984).

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government's policies, including . . . religious leaders and activists . . . ."; "the only factor shown to be a basis forpersecution is the individual's actual or perceived political opinions")(emphasis added) at 12.

Moreover, there is considerable documentary evidence that nearly every political detainee in El Salvador is subjected to human rights abuse. Annual Report of the Inter-American Commission on Human Rights 1984-1985, OEA/Ser.L/V/11.66 doc. 10 rev.1 (Oct. 1985)("the IACHR has received . . . charges of cruel, inhuman or degrading treatment to which almost all persons of both sexes held by Salvadoran authorities have been subjected"; hundreds of persons have been held in custody for four or five years "without charges and without being brought before judicial authorities").

Contrary to the innuendos raised in petitioner's brief, after investigations by both the FBI and Salvadoran security forces, there is no evidence that respondent presents a security threat to that country.

REASONS FOR DENYING CERTIORARI

THERE IS NO REASON TO DELAY THE ADMINISTRATIVE REHEARING OF THIS CASE

The court of appeals was correct in ruling that respondent is entitled to have her asylum case remanded to the immigration court for the consideration of newly disclosed evidence. Petitioner, however, contends that this case should not be remanded and requests that the petition for certiorari should be held until this Court decides the standard of proof applicable to asylum determinations, an issue currently under review in INS v. Cardoza-Fonseca, No. 85-782, argued October 7, 1986. Although the court below did address the question presented in Cardoza-Fonseca, there is no good reason to grant or hold the petition in this case because its outcome does not necessarily depend upon this Court's precise formulation of the appropriate standard of proof.

According to regulations promulgated by the Attorney General, all requests to the immigration judge for political asylum "shall also be considered as requests for withholding of deportation" under Section 243(h) of the Immigration and Nationality Act. 8 C.F.R. 208.3(b). This Court has previously decided that in order to be eligible for a mandatory grant of temporary withholding of deportation the applicant must prove a "clear probability" of persecution. INS v. Stevic, supra. The government argued below and in its brief in Cardoza-Fonseca that an applicant must also demonstrate a "clear probability" of persecution in order to be eligible for political asylum under Section 208(a) of the Act, a question left open in Stevic.

The court below correctly decided that the "well-founded fear of persecution" standard applicable to requests for asylum is different and more generous than the

"clear" probability of perscution standard for withholding. That decision is supported by the statute's plain language and legislative history and is in accord with decisions of the second, sixth, seventh, and ninth circuits. See Carcamo-Flores v. INS, No. 85-4062 (2d Cir. Nov. 6, 1986), Yousif v. INS, 794 F. 2d 236, 241-42 (6th Cir. 1986), Youkhanna v. INS, 749 F. 2d 360 (6th Cir. 1984), Carvajal-Munoz v. INS, 743 F. 2d 562 (7th Cir. 1984); INS v. Cardoza-Fonseca, 767 F. 2d 1448 (9th Cir. 1985), cert. granted, No. 85-782 (Feb. 24, 1986), and Bolanos-Hernandez v. INS, 749 F. 2d 1316, 1322 (9th Cir. 1984). Only one circuit court disagrees with the fifth circuit and the other circuits regarding the meaning of the legal standard, and requires a showing of a "clear probability" of persecution in order to establish eligibility for asylum. Sotto v. INS, 748 F. 2d 832 (3d Cir. 1984).

No matter how the question presented in

Cardoza-Fonseca is decided, the controversy in this case can most efficiently be resolved by a prompt remand to the administrative agency to develop a full record. Because the regulations require the immigration judge to determine both whether respondent is eligible for both asylum and whether she is eligible for withholding of deportation, the underlying facts of her case will have to be assessed under both the "clear probability" and the "well-founded fear of persecution" standards.[4] As this case primarily concerns respondent's right to present material evidence previously withheld by the government, a disposition at this stage would deprive her of the opportunity to demonstrate for the first time her eligibility for relief under either

4/ Of course, if this Court's decision in Cardoza-Fonseca is handed down before the immigration judge renders his or her decision on remand -- a highly likely probability -- the correct standard can be applied.

formulation of the standard. Moreover, respondent may prove, as she has consistently asserted she can, that she has a "clear probability" of persecution and thus statisfy even the standard advocated by the petitioner. Cf. Aviles-Torres v. INS, 790 F. 1433 (9th Cir. 1986)(applicant found to have established a "clear probability" of persecution on similar facts). If any unresolved issues remain, judicial review at a later date, on a full record, will be preferable to review at this stage.[5] Los Angeles v. Preferred Communications, ____ U.S. ___, 90 L.Ed.2d 480, 488 (1986).

In other asylum cases in a similar posture, the Immigration and Naturalization Service has declined to seek a writ of

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5/ On remand, the immigration judge may find that respondent has met both standards of proof, or neither, in which case the outcome in Cardoza-Fonseca will have no impact on her case. The outcome there will only affect her case if the immigration judge finds that she meets the more generous "well-founded fear" (continued on following page)

certiorari and permitted remands from the courts of appeals even though those cases turned on the issue under review in Cardoza-Fonseca. Tejeda-Leon v. INS, No. 83-7863 (9th Cir. July 22, 1986); Natareno-Orosco v. INS, No. 85-7469 (9th Cir. June 9, 1986), Aguirre-Colindres v. INS, No. 84-7718 (July 10, 1986); Espinoza de Espinoza v. INS, No. 84-7401 (9th Cir. May 27, 1986); Cruz-Canales v. INS, No. 84-7075 (9th Cir. Nov. 21, 1985). In those cases, petitioner has recognized that, regardless of the outcome, each party will still be entitled to pursue

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standard for asylum but not the more stringent "clear probability" standard for withholding. In that event the INS can exercise its right to appeal to the Board of Immigration Appeals, as it currently does in numerous cases arising in the five circuits in which immigration judges currently apply different standards to asylum and withholding claims. If this Court later rules that the showing for asylum is the higher "clear probability" of persecution standard, the Board will sustain the INS appeal. On the other hand, if this Court upholds the Ninth Circuit position, respondent's entitlement to relief will finally be resolved.

administrative remedies if it determines the judge's findings conflict with this Court's subsequent disposition in Cardoza-Fonseca. For this same reason, the government does does not take the position that asylum hearings per se should be held in abeyance until the standard of proof is settled. As there are sufficient administrative remedies to correct any result which is inconsistent with Cardoza-Fonseca, there is no benefit to holding the petition and delaying a rehearing here.

On the other hand, assuming she is ultimately granted asylum, respondent has been prejudiced by the government's false accusations regarding her identity and its refusal to release the three FBI documents to her in a timely manner. Postponing a resolution will only compound that harm. For more than five years, respondent has had no recognized immigration status, no work authorization, and lived with the fear and

uncertainty that she may be deported. If she prevails, she will be entitled to work and might also be eligible for certain public assistance benefits. She would also become eligible, subject to the quota and eligiblity criteria in Section 209(b) of the Act, for adjustment of status to permanent resident one year after the grant of asylum. The creation of a full record and findings based thereon will serve to advance the final resolution of respondent's status, whereas holding this petition further delays a final resolution of her immigration status and entitlement to other benefits.

CONCLUSION

The petition for a writ of certiorari should be denied and this petition should not be held for a disposition in Cardoza-Fonseca, No. 85-782.

Respectfully submitted,

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